2-1200-4987-7

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

In the Matter of Barbara Jo Walters, William M. Dixon, Ronald M. Holt, and Marianne Yoshida,

Employees,

vs.

The State of Minnesota by its Commissioner of Jobs and Training and its Commissioner of Employee Relations,

Employer.

RULING_ON_MOTION FOR_SUMMARY_DISPOSITION

The State of Minnesota seeks summary disposition of the above-captioned matter on the ground that there are no material issues of fact in dispute and that it is entitled to a determination in its favor on the petition of the Employees as a matter of law. The Employees filed a written response to the Motion on May«17, 1991. Both parties filed a reply memorandum, the last being received on May 23, 1991. At the request of the Employees, a decision on the Motion was deferred during the period of the summer out-of-town hearing schedules of several of the Employees.

Appearances: Sharon Lewis, Special Assistant Attorney General, 525 Park Street, Suite«500, St. Paul, Minnesota 55103, represented the Employer; and the Employees appeared pro_se.

Based on the written memoranda of counsel and on all the files and records herein, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. The Employees are all classified employees of the State of Minnesota who, prior to May 22, 1990, were within the civil service classification of Compensation Attorney within the Minnesota Department of Jobs and Training.

2. On May 22, 1990, the Commissioner of Employee Relations approved the establishment of a new class titled Unemployment Insurance Judge with a class code of 003069 in Bargaining Unit 219 with a law career cluster. The

compensation code assigned to the class title Unemployment Insurance Judge was compensation code 161, within the current Commissioner's Plan issued by the Department of Employee Relations.

3. On March 1, 1990, the Deputy Commissioner of Employee Relations transmitted to the Department of Jobs and Training the results of a Hay Evaluation Committee review of the then-current position of Compensation Attorney within the Department. The evaluation of the then-current position of Compensation Attorney showed a Hay score of 417+1. The Department of Employee Relations determined that such an evaluation would convert to a salary range of 151 on the professional scale used in the current Commissioner's Plan if a straight trend line conversion were used.

4. Pursuant to a Hay evaluation rating, it was recommended that the current Compensation Attorneys within the Department of Jobs and Training be transferred to the new class of Unemployment Insurance Judge at their then-current compensation schedule of 161 within the Commissioner's Plan.

5. On August 15, 1990, the Employees were notified that they would be removed from the Compensation Attorney class and transferred to the new class of Unemployment Insurance Judge. The transfer was at the then-current salary level the Employees had received prior to their movement to the new class. The job duties of the Employees were in no way changed by the transfer to the new class.

6. At an unspecified time, the Department of Employee Relations, as recommended by the Department of Jobs and Training, determined that admission to the Minnesota Bar and current licensure to practice law in the State of Minnesota would not be a minimum qualification for employment as an Unemployment Insurance Judge.

7. On August 17, 1990, the Department of Employee Relations published notice in the Career Opportunity Bulletin of current vacancies within the class Unemployment Insurance Judge. That publication indicated that while practice of administrative law would e

8. On September 6, 1990, Employee Barbara Jo Walters filed a grievance with the Department of Employee Relations regarding the minimum qualifications for Unemployment Insurance Judge set forth in the Minnesota Career Opportunities Bulletin of August 17, 1990. She asserted that the failure to require licensure to practice law in the State of Minnesota as a minimum qualification amounted to an impermissible downgrading of the position of Unemployment Insurance Judge, a classification to which she had been moved. Ms. Walters and the other Employees are all attorneys, licensed to practice law in the State of Minnesota.

9. By letter dated October 5, 1990, the Commissioner of Employee Relations, through a Deputy Commissioner, found that the grievance filed by Ms.

Walters was not meritorious. The Deputy Commissioner stated that, pursuant to Minn. Stat. Þ 43A.05, subd. 1 (1989), the Commissioner of Employee Relations has sole authority to prepare examinations, rank candidates for civil service employment and establish the qualifications for job classes in the classified service. The Commissioner concluded that current licensure to practice law in Minnesota was not a necessary minimum qualification for entry into a position as an Unemployment Compensation Judge. The letter also informed Ms. Walters that her movement from the Compensation Attorney class to the Unemployment Insurance Judge class was a transfer rather than a demotion, which was not subject to appeal under Minn. Stat. Þ 43A.33 (1989).

10. Ms. Walters did not attempt any appeal of the decision of the Commissioner of the Department of Employee Relations stated in Finding 9, supra.

11. The Compensation Attorney classification to which the Employees had previously been assigned included as a necessary special qualification admission to practice law in the State of Minnesota. Pet. Ex. 13. Since July«31, 1979, it had been the policy of the Department of Jobs and Training to hire only attorneys licensed to practice law in the State of Minnesota for Unemployment Insurance appeals hearing positions, as vacancies occurred. Pet. Ex. 3.

12. In response to the Motion, the Employees have filed no affidavits or other documents stating with specificity any actions by DOER or the Department of Jobs and Training tending to establish bad faith by either department in the creation of the new classification of Unemployment Compensation Judge, setting the minimum qualifications of that position or moving all Compensation Attorneys within the Appellate Division of the Department of Jobs and Training into the new classification.

13. By letter dated September 6, 1990, the Employees filed a Notice of Appeal with the Chief Administrative Law Judge, asserting that the actions of DOER in establishing the new non-attorney classification and transferring the Employees into that classification amounted to a demotion of the Employees within the meaning of Minn. Stat. Þ«43A.33 (1989). The Notice of Appeal requests a "just cause" hearing under that section of the statutes.

14. On September 17, 1990, a Notice of and Order for Hearing was issued by Administrative Law Judge Steve M. Mihalchick in the above-captioned matter. An Amended Notice and Order for Hearing was also issued by Administrative Law Judge Steve M. Mihalchick.

Based on the foregoing Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. The Administrative Law Judge has jurisdiction to determine whether the actions of the Department of Employee Relations and the Department of Jobs and Training amount to a demotion of the Employees within the meaning of Minn. Stat. Þ 43A.33 (1991).

2. The Employees have the burden of establishing by a preponderance of the evidence that the classification decision of the Commissioner of the Department of Employee Relations amounted to a demotion under Minn. Stat. Þ 43A.33 (1991). Minn. Rules

3. There are no material issues of fact in dispute which would affect the application of Minn. Stat. Þ 43A.33 (1991), to the classification decision of the Commissioner of the Department of Employee Relations stated in Findings 5-7, supra.

4. The classification decision of the Commissioner of the Department of Employee Relations did not result in a demotion of the Employees within the meaning of Minn. Stat. Þ 43A.33 (1991).

5. The Employees have failed to demonstrate by affidavit or other filing that there is a material issue of fact with respect to the good faith of either department in participating in the reclassification.

6. The Employees have remedies apart from Minn. Stat. Þ 43A.33 (1991), to pursue the issue of whether acting as an Unemployment Compensation Judge without current licensure as an attorney constitutes the unauthorized practice of law.

Based on the foregoing Conclusions, the Administrative Law Judge makes the following:

ORDER

1. The Motion of the State of Minnesota to dismiss the appeal of the Employees under Minn. Stat. Þ 43A.33 (1991), is GRANTED.

2. Since the employees have not been demoted within the meaning of Minn. Stat. Þ 43A.33 (1991), the Administrative Law Judge has no authority to review the propriety of the classification decision of the Commissioner of the Department of Employee Relations stated in Conclusion 3, supra.

3. Pursuant to Minn. Stat. Þ 43A.33 (1991), this Order is a final decision of the administrative agency within the meaning of Minn. Stat. Þ 14.63 (1991). It may only be appealed pursuant to Minn. Stat. ÞÞ 14.63-14.68 (1991).

Dated this 3rd day of October, 1991.

_/s/_Bruce_D._Campbell_____

BRUCE D. CAMPBELL
Administrative Law Judge

MEMORANDUM

The Employees in this contested case proceeding, prior to May 22, 1990, were classified as Compensation Attorneys, conducting appeals hearings within the Unemployment Compensation Division of the Department of Jobs and Training. The Department requested that their positions be evaluated for reclassification. At the same time, the Department suggested to the Department of Employee Relations (DOER) that a new classification be created for Appeals Hearing Officers assigned to the Unemployment Compensation Division. After appropriate evaluation determinations, a new classification of Unemployment Compensation Judge was established within the Division. The positions to which the Employees had been assigned were reclassified as positions to be filled by members of the new class, Unemployment Compensation Judges. The Employees were reclassified as Unemployment Compensation Judges. Both the old and new classifications carried the same salary structure, Range 161 within the Commissioner's Plan. The change in classification of both the positions and the Employees did not involve any change in the duties assigned to the Employees or effect their work responsibility in any manner.

DOER determined that the minimum entry level qualification for holding the position of Unemployment Compensation Judge was graduation from an accredited law school. Current licensure as an attorney in the State of Minnesota was not required. The Employees, who formerly held an Attorney civil service qualification, are all attorneys licensed to practice law in the State of Minnesota. Historically, persons conducting unemployment compensation appeal hearings have not always been licensed attorneys. In fact, some current professional employees of the Unemployment Compensation Division of the Department of Jobs and Training are not attorneys. Since at least 1979, however, new employees conducting such hearings have been required to be licensed attorneys. For an extended period of time, persons classified

When the Employees became aware of DOER's decision to allow entry to the new class without licensure as an attorney, they appealed to the Commissioner under Minn. Stat. Þ 43A.07 (1990), asserting that the minimum qualifications established were inappropriate. Under Minn. Stat. Þ 43A.07 (1990), no hearing is required before the Commissioner on a classification or minimum qualification decision and no appeal from the Commissioner's decision is specifically provided. The Employees then asserted that the creation of the

new classification without a requirement of licensure to practice law was, as to them, a demotion under Minn. Stat. Þ 43A.33 (1991). They argue principally that the reduction in minimum qualifications dilutes or devalues their position and may deprive them of future monetary benefits.

The State has requested that the Administrative Law Judge dispose of the Employees' claim without hearing. The request for summary disposition is analogous to a motion for summary judgment under Rule 56.02 of the Minnesota Rules of Civil Procedure. The same standards apply. Minn. Rule part 1400.5500 K (1991). Summary disposition of a claim is appropriate when there is no genuine issue as to any material fact and one party is entitled to a favorable decision as a matter of law. Minnesota Rule of Civil Procedure, Rule 56.03. A material fact is one which is substantial and will effect the result or outcome of the proceeding, depending on the determination of that fact. Highland Chateau_v._Minnesota_Department_of_Public_Welfare, 356 N.W.2d 804 (Minn. App. 1984), rev. den., Feb. 6, 1985. In considering a Motion for Summary Disposition, the evidence must be viewed in the light most favorable to the non-moving party. Grondahl_v._Bulluck, 318 N.W.2d 240 (Minn. 1982); Nord_v. Herreid, 305 N.W.2d 337 (Minn. 1981); American_Druggists_Ins._v._Thompson Lumber_Co., 349 N.W.2d 569 (Minn. App. 1989).

With a motion for summary disposition, the initial burden is on the moving party to show facts establishing a prima facie case for the absence of material facts at issue. Theile_v._Stick, 425 N.W.2d 580, 583 (Minn. 1988). Here the State has met its burden. Minn. Stat. Þ 43A.07 (1991); Gorecki_v._Ramsey County, 437 N.W.2d 646 (Minn. 1989). Once the moving party has established a prima facie case, the burden shifts to the non-moving party. Minnesota_Mutual_Fire_and_Casualty_Company_v._Retrum, 456 N.W.2d 719, 723 (Minn. App. 1990). To successfully resist a motion for summary disposition, the non-moving party must show that there are specific facts in dispute which have a bearing on the outcome of the case. Hunt_v._IBM_Mid_America_Employees Federal, 384 N.W.2d 853, 855 (Minn. 1986). The non-moving party may not rely on general assertions; significant probative evidence must be offered. Minnesota Rules of Civil Procedure, Rule 56.05; Carlisle_v._City_of Minneapolis, 437 N.W.2d 712, 715 (Minn. App. 1989); Celotex_Corp._v._Catrett, 477 U.S. 317, 322-23 (1986). The evidence introduced to defeat a summary disposition motion need not be admissible trial evidence, however. Carlisle, 437 N.W.2d at 715, citing Celotex_Corp._v._Catrett, 477 U.S. 317, 324 (1986).

The Employees assert that the classification decision of the Commissioner will affect them adversely in a number of ways and was made in bad faith. The general assertions of harm or bad faith, however, are not supported by the types of substantive evidence, substantiation or specificity required to avoid a motion for summary disposition. It should also be noted that a variety of the types of harm alleged have been held legally insufficient to establish a claim of demotion in the context of a civil service classification decision

having general application. The Administrative Law Judge, therefore, believes
that the non-moving parties have not established the existence of material issues of fact requiring a hearing for their resolution.

The current inquiry is extremely limited. The Administ

It is important to note that Minn. Stat. Þ 43A.33 (1991) appears in the context of discipline against individual employees for unsatisfactory job performance. In contrast, the statutory provision relating to the authority of
the Commissioner, Minn. Stat. Þ 43A.07 (1991), relates not to the acceptability
of the individual performance of an employee but to the general oversight of the civil service system in establishing job classifications and minimum qualifications. Minn. Stat. Þ 43A.07 (1991), requires the Commissioner of the
Department of Employee Relations to maintain, revise and administer a classification plan. As part of those duties the Commissioner must establish appropriate qualifications for new positions and make reclassification decisions. The Commissioner has the authority to reclassify a position, change
the title of the position, establish a new class and assign an appropriate salary rate or range to the class. Minn. Stat. Þ 43A.07, subd.«2 (1991). The
decisions of the Commissioner are subject to protest by affected appointing authorities or employees. A limited opportunity for review is available before
the Commissioner. Minn. Stat. Þ 43A.07, subd. 3 (1991), however, provides that
the reclassification decisions of the Commissioner are not subject to the contested case provisions of the Minnesota Administrative Procedure Act. A contested case hearing is only available in cases of discharge, suspension or demotion. The issue then is the extent to which a nonappealable decision made
by the Commissioner under Minn. Stat.
Þ«43A.07 (1991) may be challenged by incumbent employees under Minn. Stat. Þ«43A.33 (1991).

The State argues that no reclassification decision of the Commissioner which has general application to an entire class of employees may be deemed a demotion under Minn. Stat. Þ 43A.33 (1991), even if incumbent employees are adversely impacted. It relies on the decision in Gorecki_v._Ramsey_County, 437
N.W.2d 646 (Minn. 1989). The Employees argue that Gorecki, supra, may be distinguished from the present situation on its facts.

Gorecki_v._Ramsey_County, supra, is susceptible of several interpretations. When broadly read, Gorecki, supra, supports the position of the State, as long as the classification decision of the Commissioner is made in good faith. 437 N.W.2d at 650. Under the State's reading of Gorecki, supra, summary disposition of the Employees' claim would be appropriate since the classification decision of the Commissioner was made with respect to an entire class of employees in furtherance of a general authority to oversee the
State civil service system. That interpretation of Gorecki, supra, finds support in the decisions of a number of foreign jurisdictions. Bell_v.

Department_of_Health_and_Human_Resources, 43 S.2d 945 (La 1986); Heyne_v. Mabrey, 383 N.E.2d 464, 467 (Ind. 1979). The State also asserts that there is no evidence of bad faith on the part of the Commissioner in making the classification decision which affected the Employees.

Gorecki_v._Ramsey_County, supra, however, may legitimately be read more narrowly, as holding that on the facts presented there had not been a sufficient interference with the position of the incumbent employees to constitute a demotion. Under that more limited reading of Gorecki, supra, adverse consequences of a Commissioner's reclassification decision may be so immediate and substantial on existing employees as to constitute a demotion, even if it affects an entire class of employees ,rather than just an individual employee. It is, apparently, this reading of Gorecki, supra, that the Employees advocate.

The Employees assert a variety of adverse impacts from the decision of the Commissioner. The Employees argue that they may be assigned to a bargaining unit or salary compensation plan within a non-attorney classification which may provide fewer benefits and reduced opportunities for merit pay or increases in income. The Employees also gene

Minn. Stat. Þ 43A.33 (1991), does not define the term "demotion", which gives rise to the right to a just cause hearing. Nor has the Commissioner adopted rules defining that term. In Administrative Procedure 15.6, however, the Commissioner of DOER defines a demotion as "the movement of an employee to a class assigned to a salary range which is two_or_more steps lower at the maximum." The Commissioner of Employee Relations is required to develop Administrative Procedures designed to make operational specific provisions of Minnesota Statutes Chapter 43A. Other rules of the Commissioner, not specifically applying to Minn. Stat. Þ 43A.33 (1991), define a demotion in terms of a reduction in salary.

The Administrative Law Judge does not adopt the definition of the Commissioner as determinative. It is, however, important to note that the maintenance of their existing salary by the Employees when they were transferred to the new classification is an important factor in considering a claim of demotion. Gorecki_v._Ramsey_County, supra.

The Administrative Law Judge finds that there can be no demotion of the Employees under Minn. Stat. Þ 43A.33 (1991), when they maintain their existing salary and experience no change in job duties. Heyne_v._Mabrey, 383 N.E.2d 464, 467 (Ind. App. 1978); Balas_v._Department_of_Public_Welfare, 563 A.2d 219, 222 (Pa. Cmwlth. 1989); Wise_v._South_Carolina_Tax_Commission, 376 S.E.2d 262 (S.C. 1989); Adelman_v._Bahou, 446 N.Y.S.2d 500, 85 A.D.2d 862 (1981); McHale v._Commonwealth, 553 A.2d 956 (Penn. 1989).

The Employees have asserted a variety of harms which they claim result in a demotion under Minn. Stat. Þ 43A.33 (1991). Initially, the Administrative

Law Judge finds that the likelihood of any of the asserted harms coming to pass has not been established by the Employees with any evidentiary showing. They merely assert, with no evidentiary support, that some adverse consequences may follow. As such, their claims of adverse impact are unsupported and unsubstantiated assertions with no evidence from which the Administrative Law Judge can determine whether the concerns raised are more than conjecture. Moreover, the harms alleged by the Employees do not result in a demotion under the case law. A change in job title does not result in a demotion. Commonwealth,_Office_of_Administration_v._Orage, 515 A.2d 852 (Penn. 1986); Heyne_v._Mabrey, 383 N.E.2d 464, 467 (Ind. App. 1979). Nor does some asserted adverse impact on future earnings or opportunities give rise to a supportable claim of demotion. Heyne_v._Mabrey, supra; Balas_v._Department_of_Public Welfare, 563 A.2d 219 (Pa. Cmwlth. 1989). See also, Gorecki_v._Ramsey_County, 437 N.W.2d 646, 650 (Minn. 1989); Lee_v._Metropolitan_Airport_Commission, 428 N.W.2d 815, 821 (Minn. App. 1988).

The most serious asserted harm is that the change in minimum qualifications, licensure to practice law in the State of Minnesota, somehow dilutes or devalues the Employees' civil service positions so as to result in a demotion under Minn. Stat. Þ 43A.33 (1991). As previously noted, however, one does not have a protectable civil service right in a particular title or classification. Heyne_v._Mabrey, 383 N.E.2d 464, 467 (Ind. App. 1979); Commonwealth,_Office_of_Administration_v._Orage, 515 A.2d 852, 853-854 (Pa. 1986). The Employees have not alleged any statutory provision or contractual undertaking which would prevent the Commissioner from exercising the authority provided by Minn. Stat. Þ 43A.07 (1991), to determine the minimum qualifications necessary for employment as an Unemployment Compensation Judge. The Commissioner determined that the position did not legitimately require, as a minimum qualification, licensure to practice law in the State of Minnesota. The decision of the Commissioner is non-appealable. Minn. Stat. Þ 43A.07 (1991) should not be eviscerated by an incumbent employee asserting a diminution in his position as a result of a change in minimum qu Stat. Þ 43A.33 (1991).

The last assertion of the Employees is that the decision of the Commissioner was made in bad faith. No more specific facts are presented except unsupported statements that the action was taken in retaliation for compensation positions taken by the Employees and other Compensation Attorneys at some time in the remote past. It could be asserted that the good faith of the Commissioner would only be relevant if a demotion were first established. Gorecki_v._Ramsey_County, supra. The Commissioner, it may be argued, is free to take whatever action in management of the civil service system is deemed appropriate, irrespective of motive, as long as no demotion occurs. Under that analysis, the issue of the good faith of the Commissioner in this proceeding would not be material.

A second construction of the requirement of good faith is that the Commissioner may not take a general personnel action which has some adverse impact on existing employees unless the action is taken in good faith. Several Minnesota cases discuss the concept of good faith and reclassification in a civil service context. See State_v._Civil_Service_Board, 32 N.W.2d 583 (Minn. 1948); Young_v._City_of_Duluth, 410 N.W.2d 227 (Minn. App. 1987). The most appropriate definition of bad faith, in the context of this proceeding, was stated by the South Carolina Court as follows:

> When the reclassification serves as a pretext, that is, something to conceal its true purpose or object to discipline or punish, then it is punitive.

Wise_v._South_Carolina_Tax_Commission, 376 S.E.2d 262, 264 (S.C. 1989).

In this case, the Employees have not supported their allegations of bad faith or retaliation with any more than a general conclusory statement. No facts have been identified by the Employees as showing that the reclassification was a pretext for an improper purpose. The evidence reflected in the Findings is that the classification decision complained of by the Employees resulted from a normal Hay job analysis that concluded that the job of the Employees did not require current licensure to practice law. The Employees have not advanced sufficient evidence for the Administrative Law Judge to require a hearing on the issue of the good faith of the Commissioner. Bell_v._Department_of_Health_and_Human_Resources, 483 S.2d 945, 951-52 (La. 1986).

The Employees also assert that conducting unemployment compensation appeals hearings constitutes the practice of law. Determining what constitutes the unauthorized practice of law is the sole responsibility of the Minnesota Supreme Court. Fitchette_v._Taylor, 254 N.W. 910 (Minn. 1934). As previously discussed, the jurisdiction of the Administrative Law Judge is limited to the issue of whether the Employees have been demoted. Minn. Stat. Þ 43A.33 (1991). Application of that statute in no way depends on determining whether conducting unemployment compensation appeals hearings amounts to the practice of law. If conducting such hearings is the practice of law, requiring current licensure to practice law, avenues of redress, other than this personnel hearing, are available.

BDC